BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

In the Matter of: **TOM ORT TRUCKING, INC.,** **Respondent.**	**Docket No. FMCSA-2007-0006**[1] **(Midwestern Service Center)**

ORDER APPOINTING ADMINISTRATIVE LAW JUDGE

1. Background

On June 27, 2006, Claimant, the Field Administrator for the Midwest Service Center, Federal Motor Carrier Safety Administration (FMCSA), issued a Notice of Claim to Respondent, Tom Ort Trucking, Inc., proposing a civil penalty of $47,300 for alleged violations of the Federal Motor Carrier Safety Regulations (FMCSRs). Specifically, the Notice of Claim, which was based on a June 5, 2007 compliance review, charged Respondent with 43 violations of 49 CFR 395.8(e), with a proposed civil penalty of $1,100 per count, for false reports of records of duty status.[2]

On July 31, 2007, Respondent replied to the Notice of Claim, denying 30 of the 43 charges and offering to admit the remaining 13 charges and submit to binding arbitration on the condition that the 30 denied charges be dismissed on the merits. In the alternative, Respondent requested a formal hearing on the 30 denied charges. As an affirmative defense, Respondent asserted that its records incorrectly matched drivers and toll transponders for five drivers, which accounted for the 30 charges of false reports or

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[1] The previous case number of this matter was WI-2007-0169-US0563.

[2] *See* Exhibit A to "Field Administrator's Objections to Respondent's Request for Administrative Adjudication" (Claimant's Objections to Adjudication)

records of duty status in the Notice of Claim. Additionally, Respondent maintained this it is a "small entity" within the meaning of 5 U.S.C. § 601, entitling it to a reduction or waiver of the penalties sought pursuant to section 223(a) of Subtitle B of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), and that it is entitled to recovery of attorneys fees and costs in defending this action pursuant to 5 U.S.C. § 504(a)(1) and (2). Respondent neither admitted nor denied the 13 charges it conditionally offered to admit.[3]

On October 19, 2007, Claimant submitted his "Objections to Respondent's Request for Administrative Adjudication" (Claimant's Objections to Adjudication).[4] In it, he disputed Respondent's affirmative defense, arguing that Respondent submitted the toll transponder records and identified the corresponding drivers and should not be permitted to revise its submission. Claimant stated that the allegations of violations were supported by drivers' records of duty status. Claimant also gave notice of his intent to file a Motion for Entry of Default Order as to those 13 claims that Respondent conditionally offered to admit.

On October 22, 2007, Respondent answered Claimant's Objections to Adjudication, arguing that a material factual dispute existed as to whether or not the toll transponder unit believed to be with certain drivers and in certain vehicles was in fact with those drivers and/or in those vehicles.

On November 2, 2007, Claimant submitted his "Motion for Entry of Partial

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[3] *See* Exhibit B to Claimant's Objections to Adjudication.

[4] On October 3, 2007, Claimant submitted a motion for extension of time to October 23, 2007, to respond to Respondent's request for administrative adjudication. On October 8, 2007, Respondent submitted a letter acknowledging receipt of the motion requesting extension of time and advising that Respondent had no objection to the extension. Claimant's motion is granted.

Default Judgment and Memorandum in Support" (Motion for Partial Default), contending that Respondent failed to deny the 13 charges it conditionally offered to admit in accordance with the requirements of 49 CFR 386.14(c), thereby resulting in an admission. On this basis, Claimant sought a default judgment on the 13 counts and an order requiring payment of the corresponding fine of $14,300. Claimant further argued that Respondent is barred from seeking arbitration as this is the third enforcement action against it for log falsification within six years, making this a case under section 222 of the Motor Carrier Safety Improvement Act of 1999 (MCSIA). Additionally, Claimant addressed Respondent's assertion that it is entitled to a reduction or waiver of the proposed penalty, indicating that the maximum civil penalty is mandatory in this case because it falls under section 222 of MCSIA. Claimant did not submit a Motion for Final Order concerning the 30 charges that Respondent denied.

On November 16, 2007, Respondent answered Claimant's Motion for Partial Default,[5] arguing that the Agency's Rules of Practice permit a default judgment only if there has been a failure to timely respond to the Notice of Claim; it contended that its timely request for arbitration satisfied the requirements for a reply. Additionally, Respondent asserted that if its failure to deny the 13 counts for which it sought binding arbitration was deemed an admission, then it is entitled to binding arbitration because it satisfied the admission of liability requirement in 49 CFR 386.14(b)(3). Respondent also contested Claimant's contention that arbitration is not available to Respondents whose cases are subject to the section 222 maximum penalty requirement because the revised Rules of Practice do not preclude arbitration for section 222 cases.

[5] See "Reply to Field Administrator's Motion for Entry of Partial Default Judgment and Memorandum in Opposition" (Respondent's Answer).

2. Discussion

The revised Rules of Practice, at 49 CFR 386.14(b), set forth Respondent's options for replying to a Notice of Claim. They are: (1) paying the proposed penalty in full; (2) contesting the claim pursuant to paragraph (d) of section 386.14; or (3) seeking binding arbitration in accordance with the Agency's program. Respondent elected to deny 30 of the 43 charges and offer to admit the remaining 13 charges if its request for binding arbitration was accepted. Respondent argued that this response was sufficient to preclude a default judgment under the Rules of Practice. Although Respondent may be correct in theory, its position on the request for binding arbitration has muddied the waters.

Under the revised Rules of Practice, "[a]ny allegation not specifically denied is deemed admitted."[6] By not denying the 13 allegations, Respondent admitted them. Admissions, however, do not necessarily preclude defaults. "Once a respondent has admitted a violation or violations for which it is charged, it should choose either option 1, pay the full amount of the civil penalty, or option 3, seek binding arbitration on the amount of the civil penalty and/or the length of time in which to pay it."[7] Even though Respondent indicated in its Answer to Claimant's Motion for Partial Default that it had sought binding arbitration with respect to the 13 alleged violations,[8] its Reply to the Notice of Claim stated that it would request binding arbitration "if [the remaining 30

[6] 49 CFR 386.14(d)(1)(i)
[7] *In the Matter of Archie Palmer*, Docket No. FMCSA-2007-26787, Final Order (August 11, 2007).
[8] See Respondent's Answer, at 1.

charges] of Violation 1 are dismissed."[9] Because the remaining 30 charges are not being dismissed, it follows that Respondent did not actually request binding arbitration. Respondent confused the issue further, however, by "respectfully pray[ing] that … [the 13 alleged violations] be submitted to Binding Arbitration in accordance with 49 C.F.R. 386.14(b)(3)."[10] Respondent did not tie this request to a requirement that the other 30 charges be dismissed, even though it had done so in the previous paragraph in its Reply.

While Respondent should have been clear about whether or not it was requesting binding arbitration if the other 30 charges were not dismissed, the Reply will be treated as if it had so requested. As a result, Respondent avoided default by seeking binding arbitration on the 13 alleged violations that it had admitted.

Nevertheless, it does not automatically follow that binding arbitration is available. The mandatory maximum civil penalty provision in section 222 of MCSIA applies to this enforcement action, and it is the Agency's policy not to permit arbitration in such instances. The Agency's published guidance on the use of binding arbitration plainly states "FMCSA will not agree to arbitrate maximum penalty cases issued pursuant to section 222 of [MCSIA]."[11] Accordingly, Respondent is ineligible for binding arbitration on the 13 admitted charges, and its request is denied.[12]

As to the remaining 30 charges, the formal hearing requested by Respondent is

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[9] See Reply to Notice of Claim

[10] Reply to Notice of Claim, at 4.

[11] 69 Fed. Reg.10288, 10292 (March 4, 2004). *See also In the Matter of Williamson Distributers, Inc.,* Docket No. FMCSA-2009-0042, Order Appointing Administrative Law Judge (July 6, 2009).

[12] Respondent's contention that the revised Rules of Practice do not preclude binding arbitration for section 222 carriers is misplaced. One of the options for reply to a Notice of Claim is "(3) seeking binding arbitration in accordance with the Agency's program." See 49 CFR 386.16(b)(3)(emphasis supplied). The Agency's program is set forth in its March 4, 2004, Guidance.

granted. The matter is being sent to the Office of Hearings of the United States Department of Transportation because Claimant has taken an inordinate amount of time since the filing of his objection to a hearing without having submitted the required motion for final agency order. Although the revised Rules of Practice do not provide a deadline for filing a motion for final agency order, Claimant does not have an indefinite amount of time in which to do so. In fact, previous orders have informed Claimant of my interpretation of the revised Rules of Practice on this issue. On July 6, 2009, I found:

> Although the revised rules of practice do not provide a deadline for the filing of a Motion for Final Order following an objection with basis to a request for a formal hearing, Claimant's objection with basis should have enabled Claimant to submit his Motion for Final Order within a reasonable amount of time. Claimant's objection with basis was filed more than three years ago. One of the stated goals of the Agency is to "prevent cases from falling through the cracks due to lags in procedural responses." [Footnote omitted.][13]

Because that was the first case in which this issue was discussed, I allowed Claimant 30 days in which to submit either a Motion for Final Order or the status of the proceeding. Later that same month, in a case in which nearly two years had elapsed since Claimant had objected to a hearing without submitting a Motion for Final Order, I found that: "Claimant knew or should have known at the time he submitted his objection what the arguments would be in a forthcoming … motion for final order; accordingly, he should have been able to submit [it] in a reasonable amount of time."[14] Because our goal of preventing cases from falling through the cracks due to lags in procedural responses

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[13] *In the Matter of White Farms Trucking, Inc.*, Docket No. FMCSA-2006-24146, Order, July 6, 2009, at 3-4.

[14] *In the Matter of K & P Trucking, Inc. dba Ken Pratt Trucking*, Docket No. FMCSA-2007-0027, July 17, 2009, at 4.

had not been achieved in that matter, an administrative law judge was appointed. Although that case involved both an improper objection to the request for hearing as well as the elapse of nearly two years since the objection, Claimant has been on notice for more than six months that a lengthy delay in the submission of a Motion for Final Order is unacceptable.

Notwithstanding this notice, Claimant has yet again delayed submitting his Motion, this time for approximately 29 months. The delay is inexcusable.[15] After all, had Respondent stated that it intended to submit written evidence without a hearing, Claimant would have been required to submit his evidence no later than 60 days following service of Respondent's reply. A Motion for Final Order is essentially the submission of Claimant's evidence with argument as to why a formal hearing is not warranted. Because the basis for that argument had already been set forth in the objection, Claimant should have needed little more than the 60 days provided by regulation for the submission of evidence.[16] In any event, 29 months since the submission of the objection is not even close to reasonable. Therefore, this matter is being forwarded to the U.S. Department of Transportation's Office of Hearings.

3. Appointment of Administrative Law Judge

An administrative law judge is hereby appointed, to be designated by the Chief Administrative Law Judge of the Department of Transportation, to preside over this matter in accordance with 49 CFR 386.54, and render a decision on all issues, including the civil penalty (including the civil penalty on the 13 admitted violations), if any, to be

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[15] FMCSA will soon publish an interpretive rule setting forth the time frame following the submission of a proper objection with basis to a request for a hearing in which the Motion for Final Order must be submitted.

[16] See 49 CFR 386.16(a)(1).

imposed. The proceeding shall be governed by subparts D and E of 49 CFR Part 386 of the Rules of Practice and all orders issued by the administrative law judge.

It Is So Ordered.

Rose A. McMurray

Rose A. McMurray
Assistant Administrator
Federal Motor Carrier Safety Administration

4.8.10
Date

CERTIFICATE OF SERVICE

This is to certify that on this 12 day of April 2010, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

Tom Ort, President Tom Ort Trucking, Inc. 775 Industrial Loop Road New London, WI 54961	One Copy U.S. Mail
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Peter W. Snyder, Esq. Trial Attorney Office of Chief Counsel (MC-CCE) Federal Motor Carrier Safety Administration 19900 Governors Drive., Suite 210 Olympia Fields, IL 60461 (708) 283-3515 (phone) (708) 283-2319 (Fax)	One Copy U.S. Mail
Darin G. Jones, Field Administrator Midwestern Service Center Federal Motor Carrier Safety Administration 19900 Governors Drive, Suite 210 Olympia Fields, IL 60461	One Copy U.S. Mail
The Honorable Ronnie A. Yoder Chief Administrative Law Judge Office of Hearings, M-20 U.S. Department of Transportation 1200 New Jersey Avenue, S.E. East Building Ground Floor Room E12-320 Washington, D.C. 20590	One Copy Personal Delivery

FMCSA-2007-0006

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